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No. 86-228

In the Supreme Court of the United States

OCTOBER TERM, 1986

JUOZAS KUNGYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT H. KLONOFF
Assistant to the Solicitor General

SAMUEL ROSENTHAL
MICHAEL WOLF
JOSEPH F. LYNCH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner's submission, in his visa and citizenship applications, of false information concerning his date of birth, place of birth, wartime residence, and wartime occupations, constituted a "material" misrepresentation warranting his denaturalization under 8 U.S.C. 1451(a).

2. Whether petitioner's deliberate and repeated misrepresentations and concealments, made under oath and in the form of forged documents, rendered his citizenship "illegally procured" under 8 U.S.C. 1101(f)(6), 1427(a)(3), and 1451(a) on the ground that he lacked the requisite good moral character.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 793 F.2d 516. The opinion of the district court (Pet. App. 39a-137a) is reported at 571 F. Supp. 1104.

JURISDICTION

The judgment of the court of appeals (Pet. App. 38a) was entered on June 20, 1986. The petition for a writ of certiorari was filed on August 9, 1986, and was granted by this Court on November 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent statutory provisions are set out in an appendix to this brief.

STATEMENT

In 1981, the United States filed an action, pursuant to Section 340(a) of the Immigration and Nationality Act

of 1952 (the 1952 Act), 8 U.S.C. 1451(a), to revoke petitioner's citizenship on the ground that it was illegally procured and that it was procured on the basis of material misrepresentations. Specifically, the United States alleged in its amended complaint that (1) in July and August 1941, petitioner had participated in the murder of more than 2000 unarmed civilians by forcing the victims into a mass grave and shooting them; and (2) in connection with his visa and citizenship applications, petitioner had provided false testimony and documents concerning his date and place of birth, his place of residence during 1940-1942, and his wartime occupation. Pet. App. 3a, 40a-45a; J.A. 4-25.[1] Following a nonjury trial, the district court ruled that the government had failed to establish any ground for revoking petitioner's citizenship (Pet. App. 39a-137a).[2] The court of appeals reversed and remanded for denaturalization proceedings. Without reaching the question whether petitioner had participated in the mass murders, it held that petitioner's citizenship was procured on the basis of material misrepresentations. *Id.* at 1a-37a.[3]

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[1] The government also alleged that petitioner had misrepresented his true marital status, but it later withdrew that charge (Pet. App. 45a n.1; see also C.A. App. 172-176) ("C.A. App." refers to the three volume appendix, including the trial transcript, filed in the court of appeals; "C.A. Exh." refers to the four volumes of trial exhibits filed in the court of appeals).

[2] The court later denied petitioner's request for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(b) and (d), on the ground that the government had "conducted extensive and responsible investigation of the charges it brought against [petitioner]" and had a reasonable basis for the facts alleged in the complaint (575 F. Supp. 1208, 1210, 1211 (D.N.J. 1983)).

[3] By remanding for denaturalization proceedings, the court of appeals opened the way to the commencement of deportation proceedings; petitioner's denaturalization does not automatically result in his deportation. If, in the deportation proceeding, the immigration judge does not find that petitioner assisted in acts of persecution, then petitioner could be eligible for various forms of relief from deportation, such as suspension of deportation (8 U.S.C. 1254(a)(1)). Petitioner therefore errs in characterizing his case as "tantamount to [a] capital case[]" (Pet. 12).

1. Petitioner, a native of Lithuania, obtained a non-preference quota visa in March 1948 from the American consulate in Stuttgart, Germany. He emigrated to the United States later that year and was naturalized in 1954. Pet. App. 3a, 120a-121a.

The evidence at trial revealed that petitioner was born on September 21, 1915, in Reistru Village in the Taurage Region of Lithuania. He entered military service in 1938 and later graduated from cadet school. On December 1, 1939, after having attained the rank of junior lieutenant, he left military service and began working at the Bank of Lithuania in Kedainiai. While living in Kedainiai, petitioner joined the Sauliai (Riflemen's Association), a paramilitary organization. Pet. App. 109a, 110a; J.A. 138-139; C.A. App. 991-992.

On June 22, 1941, Nazi Germany invaded the Soviet Union, and German troops soon reached Lithuania. The Third Reich promptly began identifying, confining, and ultimately murdering all Jews in the occupied areas except for a small number who were used for forced labor. German commando units known as the SS Einsatzkommandos were responsible for exterminating the Jews and other groups deemed inimical to the Third Reich. For the most part, however, the SS Einsatzkommandos were not able to carry out all of the arrests and executions by themselves. Accordingly, they relied heavily on local residents to assist in carrying out those activities. Pet. App. 48a-64a.

Two mass killings occurred in Kedainiai in the summer of 1941 while petitioner was a resident there. The first occurred on July 23, 1941. Using the SS Einsatzkommandos, the Nazis recruited local collaborators who had been members of the Sauliai or who had been in the Lithuanian military. Approximately 125 former Communists or Soviet government officials were arrested, taken in trucks to a nearby forest, and forced into a large pit where they were shot. The second mass murder occurred on August 28, 1941, and involved the Jewish residents of the town. Having already been forced to live in a ghetto and observe severe restrictions, they were

taken to a horse breeding farm on the outskirts of town and confined there. They were then led to a huge pit, were ordered to undress, and were shot. Official German records reveal that more than 2000 Jewish men, women, and children were murdered on August 28. Pet. App. 4a, 62a, 70a-73a, 111a.[4]

In October 1941, petitioner left Kedainiai and moved to Kaunas, the capital of Lithuania (Pet. App. 111a). According to information he later provided to the German authorities, petitioner worked in Kaunas as an industrial manager, although he maintained at trial (and the district court so found) that his statements to the Germans describing his position were somewhat exaggerated (*id.* at 117a; Lodging Tr. 866). Petitioner and his wife moved again in October 1944 (at the time the German armed forces retreated from the Soviet Union), this time to Tuebingen, in Nazi Germany. Petitioner was given permission by the Nazi regime to live there without special restrictions. His residence permit was granted on

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[4] At trial, the government introduced deposition testimony, taken in Lithuania, of several eyewitnesses to the July and August murders. Three of the witnesses implicated petitioner in the atrocities. They testified that petitioner was one of the leaders of the Lithuanians who assisted the Germans and that he personally gave orders and participated in the shootings. See Pet. App. 4a-5a & n.1. The district court was concerned about the reliability of Soviet-source depositions, supervised by Soviet procurators, even though counsel for the United States and petitioner actually conducted most of the questioning, and even though some of the witnesses gave testimony that did not implicate petitioner. In addition, although all prior statements of witnesses taken in this case were turned over to petitioner, the court was troubled that the United States was unable to obtain from the Soviet Union statements signed by certain of the witnesses in the 1940's (*id.* at 105a, 107a). The court therefore admitted the depositions solely for the purpose of showing that the atrocities actually occurred (*id.* at 108a). Despite its evidentiary ruling, however, the court acknowledged at one point (*id.* at 75a) that "[t]he government's charges find strong support in three of the depositions taken in Lithuania." The court of appeals did not find it necessary to reach the question whether the district court erred in refusing to consider the depositions as evidence against petitioner (*id.* at 6a). See note 15, *infra*.

February 13, 1945, prior to the end of the war. In addition, his wife applied to the Nazi authorities for permission to practice dentistry.[5] Petitioner and his wife remained in the Tuebingen region until Allied Forces occupied the area in May 1945. Pet. App. 7a, 115a-117a; J.A. 57, 59-60.

2. a. In January 1947, petitioner and his wife applied in Stuttgart for a nonpreference quota immigration visa under the Immigration Act of 1924 (the 1924 Act), ch. 190, 43 Stat. 153 *et seq.*[6] When petitioner applied for his visa, he did not submit any of the documents in his possession or available to him that showed his true date and place of birth. See note 6, *supra*. Instead, he submitted four falsified documents: (1) a police record from Fellbach, Stuttgart, listing a false date and place of birth (Oct. 4, 1913, Kaunas, Lithuania) (J.A. 37); (2) a record from the Vatican representative in Germany listing the same false date and place of birth (J.A. 38); (3) a Lithuanian identity card, also listing the false date and place of birth (J.A. 28-29); and (4) a certificate from the Lithuanian Ex-Political Prisoners Nazi Victims Central Committee, which similarly listed the false date and place of birth and which indicated that petitioner had

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[5] In Tuebingen, petitioner was required to register with local authorities. The Tuebingen records all reflect petitioner's true place of birth and most of them reflect his true date of birth (Pet. App. 117a; J.A. 56, 65-68).

[6] Under Section 7(b) and (c) of the 1924 Act (43 Stat. 156), petitioner was required to provide certain specified biographical information, including his date and place of birth, certified copies of his birth certificate, if available, and "all other available public records concerning him kept by the Government to which he owes allegiance." The regulations provided that if a birth certificate was not available, other documentary evidence of identity had to be produced (22 C.F.R. 61.327(e), (f) and (g) (1946)). Petitioner admitted at trial (C.A. App. 1018-1020) that when he applied for a visa in 1947, he had in his possession a Lithuanian identification document reflecting his true place of birth (J.A. 51-52). Similarly, in applying for matriculation at Tuebingen University in 1945, petitioner provided a 1938 seminary record listing his true date and place of birth (J.A. 61-63).

been "persecuted by the gestapo" (J.A. 29). Petitioner's visa application (J.A. 30-34), executed under oath, also listed a false date and place of birth (J.A. 30). Additionally, his visa application indicated that from 1940 to 1942 he resided in Telsiai, Lithuania (*ibid.*);[7] petitioner did not reveal that he had lived in Kedainiai from 1939 through October 1941. Finally, petitioner's visa application listed his occupation as dental technician (*ibid.*); it did not reveal his position as a bank employee and the supervisor of a factory during the Nazi occupation of Lithuania. Pet. App. 111a, 118a-119a.

In addition to the visa application and the falsified documents, petitioner also executed under oath an Alien's Registration Foreign Service Form (J.A. 34-37). Like his other materials, that form specified a false date and place of birth (J.A. 35) and omitted reference to any work activity other than "dental technician, farmer, and forestry work" (*ibid.*).

On the basis of the information he submitted, petitioner was issued a visa on March 4, 1948. He entered the United States on April 29, 1948, upon presentation of his visa. Pet. App. 120a.

b. At trial, the government offered evidence concerning visa application procedures and the significance of false statements made by visa applicants. Specifically, former Ambassador Seymour Finger, who had been a vice consul in Stuttgart at the time petitioner submitted his application there,[8] testified that a visa applicant would first fill out preliminary forms that were reviewed by local employees. If those forms were in order, the applicant would then complete a visa application and an alien registration form and would submit identifying documents, such as his birth certificate. The entire file

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[7] The record contains no evidence of any atrocities having been committed in Telsiai (Pet. App. 34a).

[8] The vice consul who actually reviewed petitioner's application was not available and, in any event, indicated to petitioner's attorney in a telephone conversation that he had no recollection of the requirements for obtaining a visa (J.A. 175). See pages 37-38, *infra*.

would then be reviewed by a vice consul, and if everything appeared to be in order, an interview would be scheduled with the applicant. During the interview, the vice consul would focus on the applicant's biographical information, looking particularly at his residence and occupation between 1939 and 1945. As part of the procedure, the applicant was required to swear under oath to the truth of all of the statements in the application. The applicant was permitted to make corrections to the forms during the interview, but only to correct oversights and not to alter deliberate or willful falsifications of significant items. Pet. App. 30a, 117a-118a; J.A. 187-194.

Finger testified that during his tenure at Stuttgart, if a person lied under oath concerning his date and place of birth, wartime occupation, or wartime residence, the visa would be routinely denied (J.A. 200-201). Similarly, a visa would be denied if the applicant submitted falsified documents and withheld documents containing true information (J.A. 200), or if he lied about his date and place of birth to United States immigration officials and had, prior to that time, given truthful information to the German authorities (J.A. 202). Likewise, the applicant's visa would be denied if the applicant falsely claimed to have been persecuted by the Gestapo (J.A. 201). Finger also testified that during the relevant period the policy at Stuttgart was to grant visas only to persons who had close relatives in the United States and to those who had been victims of Nazi persecution. Pet. App. 29a-32a; J.A. 187, 197, 213-214, 217-218.

3. a. In May 1948, one month after arriving in the United States, petitioner submitted an application for a certificate of arrival and a declaration of intent to become a United States citizen (J.A. 38-41). In that application, petitioner again represented falsely that he was born on October 4, 1913, in Kaunas, and he again concealed his wartime employment (J.A. 40). Moreover, he certified that the assertions in his application were

"true to the best of [his] knowledge and belief" (J.A. 41).

In October 1953, petitioner applied for naturalization. At that time, he executed under oath a detailed application form (J.A. 42-48).[9] In the application, petitioner denied having ever "given false testimony to obtain benefits under the immigration or naturalization laws" (J.A. 45). He continued to maintain that he was born October 4, 1913, in Kaunas (*ibid.*).[10] Also in connection with his citizenship application, petitioner executed under oath a Petition for Naturalization (J.A. 48-50). In that petition, he similarly gave a false date and place of birth (J.A. 48). He also swore that he was a person of good moral character (J.A. 49). As part of the application process, petitioner was first interviewed under oath by the preliminary naturalization examiner; each question in the application was reviewed with petitioner, and he verified each answer (J.A. 145-150, 157-158). A designated naturalization examiner also questioned petitioner under oath (J.A. 152-153, 160-162). In February 1954, the district court granted petitioner's application for citizenship. Pet. App. 36a, 117a-118a, 120a-121a.

b. Julius Goldberg, now a retired immigration judge, was the designated examiner who processed petitioner's naturalization application.[11] He testified in a deposition admitted at trial that he invariably asked applicants to reaffirm under oath their prior statements given to the preliminary examiner. He also testified that one task of an examiner was to compare the information in a naturalization application with the documents and information provided by the alien when he applied for a visa.

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[9] The form made clear at the outset (J.A. 42) that "citizenship [could] be revoked for concealment of a material fact or for willful misrepresentation."

[10] Petitioner made a variety of corrections on the form (see J.A. 47), but he did not correct the false date and place of birth.

[11] Petitioner's preliminary naturalization examiner was deceased (J.A. 155).

If a discrepancy appeared, the naturalization application could be rejected outright or suspended pending an investigation by immigration authorities to determine deportability. If an applicant willfully gave false testimony to immigration and naturalization officials, Goldberg testified, his application could be rejected on the ground that he did not possess the requisite good moral character. Pet. App. 36a; J.A. 160-162, 165, 170-171.

4. In 1975, an investigator from the Immigration and Naturalization Service (INS) questioned petitioner under oath regarding his activities prior to entering into the United States (J.A. 70-79). Petitioner falsely stated to the investigator that he had been born on October 4, 1913, in Kaunas (J.A. 72). Contrary to his visa application (J.A. 30), he admitted that he had lived in Kedainiai between 1939 and 1941, but he claimed that he left Kedainiai in June 1941 (J.A. 73). Subsequently, in April 1977, while his case was still under investigation by the INS, petitioner submitted to immigration officials an employment certificate that purported to evidence his employment in Kaunas as of July 6, 1941 (GX A13; C.A. Exh. 38).[12]

In 1981, petitioner was again interviewed under oath, this time by attorneys from the Department of Justice (J.A. 79-137). Petitioner continued to maintain that he left Kedainiai before the atrocities in July and August 1941 and that he commenced employment in Kaunas on July 6, 1941 (J.A. 85). Petitioner indicated (J.A. 115) that he could not recall why he had omitted any reference to his residence in Kedainiai when applying for his visa. Throughout most of the questioning, he maintained that he had been born on October 4, 1913, in Kaunas

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[12] The district court (Pet. App. 111a) characterized the certificate as "somewhat suspect." It pointed out (*ibid.*) that the date petitioner was supposed to have commenced work (July 6, 1941) was a Sunday. The court also noted (*ibid.*) that the letterhead on the form was written in both Lithuanian and German, and that, while not inconceivable, "[t]his would have represented a rather rapid transition, since the Soviet Army had been driven from the City less than two weeks before the July 6 date."

(J.A. 80-81, 104, 112- 129-130). When shown documents evidencing his true date and place of birth, he claimed that those documents were Russian forgeries (J.A. 104-105). At the end of the interview, however, petitioner changed his story and admitted that the supposed forgeries were indeed correct (J.A. 131-132). Contrary to his representations to United States government officials for over three decades, petitioner admitted that he had indeed been born on September 21, 1915, in Reistru, Lithuania (*ibid.*). He claimed that he had altered his date and place of birth because he had been a member of the Lithuanian underground during the war and was being hunted by the Germans at the time he moved to Germany (*ibid.*). He did not explain why this deception was still necessary in 1953, when he was in the United States applying for citizenship. Nor did he explain why he had given his true name to the Nazis (see J.A. 59-60) or why he had given his true name, date, and place of birth to the Germans after the end of the war (see J.A. 60-61, 63-68).

On September 12, 1981, petitioner sent a letter to a Lithuanian emigre requesting his help in giving testimony (J.A. 138). In that letter, petitioner stated that he had lived in Kedainiai "from December 1939 until October 1941"—a period that included both the July 1941 and August 1941 mass murders—and that he had been a member of the Riflemen's Association (*ibid.*).

The government also obtained a letter signed by petitioner indicating that he was resigning from his job at the bank in Kedainiai effective October 16, 1941 (J.A. 51; Lodging Tr. 670-671). The letter, dated October 10, 1941, further indicated that petitioner was "[r]esiding at No. 3 Radvila St.[,] Kedainiai" (J.A. 51).

In the course of discovery in this case, petitioner responded to one of the government's interrogatories by stating that he had obtained false Lithuanian identification (J.A. 28-29) prior to entering the United States in order to avoid conscription into the Germany Army (Pet. App. 113a). Petitioner did not reiterate his prior claim

that he had been hunted by the Gestapo because of his participation in the Lithuanian underground.

At trial, petitioner admitted that he was in fact born in 1915 in Reistru, and he acknowledged that his visa and naturalization applications were false in those respects (Lodging Tr. 617-618, 620-623). When confronted with a series of official records from Germany predating his visa application that showed his correct date and place of birth, petitioner testified that he could not explain why those records had the correct information (*id.* at 859-860). Petitioner also continued to maintain that he had left Kedainiai only a few days after the German invasion and that he was not living in Kedainiai between July and October 1941 (*id.* at 756, 771). When petitioner was confronted with the letter he had written to the Lithuanian emigre indicating that he lived in Kedainiai until October 1941, he testified that the letter was simply "expanding too much" on that particular point (*id.* at 761-762). When shown the letter he had signed indicating that he had resigned from his job in Kedainiai effective October 16, 1941, petitioner simply denied that he was living or working at Kedainiai in October of that year (*id.* at 671-673). He had no explanation for the discrepancy except to indicate that "maybe" he was on a leave of absence (C.A. App. 873).

5. On September 28, 1983, the district court issued a written decision holding that the government had not established any basis for revoking petitioner's citizenship (Pet. App. 39a-137a). The court ruled, first, that petitioner's citizenship had not been "illegally procured" within the meaning of 8 U.S.C. 1451(a) (Pet. App. 122a-124a). Having excluded the government's evidence of the atrocities at Kedainiai to the extent that the evidence implicated petitioner, the court found that the government had failed to prove by clear and convincing evidence that petitioner had participated in those atrocities (*id.* at 122a-123a).[13] Second, the district court ruled that peti-

[13] The court found, contrary to petitioner's testimony, that petitioner did not leave Kedainiai until October 1941 (Pet. App. 111a). It noted (*ibid.*) that "[i]f there were admissible evidence tending

tioner's citizenship was not "procured by concealment of a material fact or by willful misrepresentation" within the meaning of 8 U.S.C. 1451(a). Notwithstanding petitioner's repeated false statements in the course of obtaining his citizenship, the court held that those false statements were not "material" as that term was construed in *Chaunt* v. *United States*, 364 U.S. 350 (1960), and in the separate opinions in *Fedorenko* v. *United States*, 449 U.S. 490 (1981) (Pet. App. 124a-137a). The court determined that none of the true facts, if known, would have warranted the denial of citizenship or would have made petitioner ineligible for a visa (*id.* at 135a). In addition, the court concluded (*id.* at 136a-137a) that disclosure of the true facts in petitioner's visa application would not have prompted an investigation by American consular officials.[14] Accordingly, the court entered judgment for petitioner.

6. The court of appeals reversed (Pet. App. 1a-37a). It found it unnecessary to decide whether the deposition evidence linking petitioner to the Kedainiai murders was erroneously excluded (*id.* at 6a. & n.2)[15] because it held that petitioner's misrepresentations were material under

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to show that defendant played a part in the killings in Kedainiai in July and August 1941, the falseness of defendant's testimony that he was in Kaunas during those months would tend to corroborate the evidence of his complicity in the killings." However, because the deposition testimony was not admitted against petitioner with respect to his role in the atrocities, the court considered petitioner's false testimony as to when he left Kedainiai only for general credibility purposes (*ibid.*).

[14] The court did not consider whether, if petitioner had told the truth at any point during the visa or naturalization process, the discrepancies created by his prior false testimony and documents would have been material. In addition, since it found that no investigation would have occurred, the court did not consider whether an investigation would (or might) have uncovered facts justifying a denial of a visa application or a citizenship petition (Pet. App. 136a-137a).

[15] The court nonetheless indicated that it "reject[ed] the suggestion that all depositions taken in the Soviet Union should be automatically excluded from evidence" (Pet. App. 6a n.2).

its construction of the standards set forth in *Chaunt* (*id.* at 8a-23a, 28a-37a). Relying on the testimony of former Vice Consul Finger, the court concluded (*id.* at 29a) that in light of the falsified documents previously submitted by petitioner, an investigation would have been conducted into petitioner's background if he had truthfully stated his correct date and place of birth when he was later interviewed under oath by the vice consul. The investigation, the court explained, probably would have revealed that petitioner had not been a victim of persecution (*ibid.*).[16] That status, the court noted, was necessary to obtain a nonpreference visa at the time and place in question (*id.* at 30a-33a). The court also concluded that if petitioner had told the truth in the course of his naturalization proceedings, the discrepancies between those truthful statements and his misrepresentations at the visa stage would have resulted in either an outright denial of the petition or a field investigation, which probably would have shown that petitioner was ineligible for a visa in the first place because he was not a victim of persecution (*id.* at 36a). Thus, the court reasoned (*id.* at 37a), petitioner's false statements were material regardless of whether the focus of inquiry was the visa stage or the naturalization stage.

SUMMARY OF ARGUMENT

I

A. Under 8 U.S.C. 1451(a), citizenship must be revoked if it was procured on the basis of a misrepresentation or concealment of a material fact. In *Chaunt* v. *United States*, *supra*, this Court held that a concealed or misrepresented fact is material if either (1) the fact, if disclosed, would have warranted denial of citizenship, or (2) "disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" (364 U.S. at 355).

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[16] The court did not decide whether materiality would be established if the government could show only that the investigation "possibly" would have revealed disqualifying facts (Pet. App. 22a).

The first *Chaunt* test requires the government to prove that a misrepresented or concealed fact would have definitely resulted in denial of a visa or citizenship. The second *Chaunt* test, however, does not require proof of the existence of ultimate disqualifying facts. Rather, as the Court's formulation indicates, it is sufficient if the government proves that there *would* have been an investigation and that such an investigation *might* have uncovered disqualifying facts.

Petitioner disputes our interpretation of the second *Chaunt* test. He maintains that proof of ultimate disqualifying facts is required under either test. Under petitioner's approach, however, a visa or citizenship applicant would have everything to gain and nothing to lose by lying about his background in an effort to avoid an investigation into his past. Even if the lie is later discovered, the passage of time will make it more difficult for the government to prove ultimate disqualifying facts. Moreover, at the denaturalization stage, the burden of proof shifts from the citizen to the government.

Petitioner's proposed standard also ignores this Court's recognition that truthful information must be obtained from citizenship applicants if the system for admitting and naturalizing immigrants is to function properly (*Chaunt*, 364 U.S. at 352-353). In addition, petitioner's standard would undermine Congress's intent in enacting the denaturalization statute. In Section 1451(a), Congress specified that denaturalization is required for *either* illegal procurement *or* procurement based on material misrepresentation. Petitioner's interpretation of the second *Chaunt* test would render the misrepresentation basis for denaturalization meaningless, since the government would have to show in every case that the visa or citizenship was illegally procured—*i.e.*, that the applicant lacked a necessary prerequisite for a visa or citizenship.

Petitioner's proposed standard would also create the anomaly of requiring a higher standard of materiality for denaturalization than for criminal prosecution. Numerous statutes (*e.g.*, 18 U.S.C. 1001, 1621) provide criminal penalties for making material false statements.

The standard of materiality under those statutes is simply that the statement have a natural tendency to influence, or be capable of influencing, the tribunal or government official.

B. Under the appropriate legal standard (and, indeed, even under petitioner's standard), petitioner's misrepresentations and concealments were material. Petitioner repeatedly misrepresented and concealed his true date of birth, place of birth, wartime residence, and wartime occupation. The testimony at trial established that if petitioner's false statements and concealments had come to light at either the visa or naturalization stage, an investigation would have occurred. Moreover, as a result of such an investigation, petitioner's visa or citizenship petition would have (or at least might have) been denied for at least four reasons. First, had petitioner given truthful information when he was interviewed under oath by the vice consul, his visa would have been denied because of his prior submission of false documents. Second, his visa or citizenship application probably would have been denied on the ground that he was not a victim of Nazi persecution and therefore was ineligible for a visa under the policies at the Stuttgart consulate in 1947. Third, petitioner's citizenship application probably would have been denied on the ground that, in light of his repeated lies under oath, he lacked the requisite good moral character. Fourth, petitioner's visa or citizenship application might have been denied because it might have led to the discovery of evidence inculpating him in the atrocities against innocent civilians in Kedainiai in July and August 1941.

II.

Petitioner's denaturalization is required for yet another reason. A necessary prerequisite to citizenship is that the applicant be of good moral character (8 U.S.C. 1427(a)). Congress specifically provided by statute (8 U.S.C. 1101(f)(6)) that a person is not of good moral character if he "has given false testimony for the purpose of obtaining benefits" under the immigration and

naturalization laws. A person who has obtained his citizenship without the requisite moral character has procured that citizenship illegally and is therefore subject to denaturalization under 8 U.S.C. 1451(a).

In the present case, petitioner repeatedly gave false testimony under oath. In addition, he submitted falsified documents to immigration officials and withheld documents containing the true information. It is also clear that petitioner's only conceivable reason for lying to government officials was to prevent an investigation into his past. Even today, petitioner can provide no logical explanation of why he lied to American officials about his date and place of birth, yet gave truthful information to the Germans. Nor can he explain why he lied about his wartime occupation. Most significantly, petitioner cannot explain why he falsely maintained that he did not live in Kedainiai during the months of July and August 1941, when thousands of civilians were killed there by the Nazis with the assistance of a Lithuanian paramilitary organization to which petitioner belonged. Petitioner's conduct, which could have formed a basis for criminal prosecution, demonstrated a lack of good moral character. His citizenship was therefore illegally procured.

ARGUMENT

I. PETITIONER'S MISREPRESENTATIONS WERE MATERIAL UNDER 8 U.S.C. 1451(a)

A. A Misrepresentation Is Material If Disclosure Of The Truth Would Have Led To An Investigation That Might Have Uncovered Facts Warranting Denial Of A Visa Or Citizenship

This Court has long recognized that citizenship is a "precious" right (*Fedorenko*, 449 U.S. at 505). For that reason, the government "'carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship'" (*ibid.* (quoting *Costello* v. *United States*, 365 U.S. 265, 269 (1961)). The government's evidence must be clear, unequivocal, and convincing, and not leave

"the issue in doubt" (*Schneiderman* v. *United States*, 320 U.S. 118, 125 (1943)). At the same time, however, the Court has recognized that "[a]cquisition of American citizenship is a solemn affair" and that "[c]omplete replies [to officials] are essential so that the qualifications of the applicant or his lack of them may be ascertained" (*Chaunt*, 364 U.S. at 352). Accordingly, "[f]ull and truthful response to all relevant questions required by the naturalization procedure is • • • to be exacted, and temporizing with the truth must be vigorously discouraged" (*ibid.*). The Court has also made clear that "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with," and it has recognized the government's right to challenge [a naturalization order] • • • and demand its cancellation "unless issued in accordance with such requirements" (*United States* v. *Ginsberg*, 243 U.S. 472, 475 (1917); see also *Fedorenko*, 449 U.S. at 506).

Section 340(a) of the 1952 Act, as amended, 8 U.S.C. 1451(a), provides that a naturalized person's citizenship may be canceled if the government can establish that his citizenship was "illegally procured or • • • procured by concealment of a material fact or by willful misrepresentation."[17] Petitioner does not dispute that throughout the visa and naturalization process, he repeatedly misrepresented and concealed his true date of birth, place of birth, wartime residence, and wartime occupation.[18] Notwithstanding the government's unrebutted evidence (J.A. 199-201) that if those lies had been exposed petitioner would never have obtained a visa in the first place, petitioner maintains (Pet. Br. 9-28) that his lies under

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[17] Although the statute speaks in terms of "willful misrepresentation" or "concealment of a material fact," the Court has indicated that concealments must also be willful and misrepresentations must also be material (*Fedorenko*, 449 U.S. at 507-508 n.28).

[18] In his brief, petitioner repeatedly focuses only on the falsehoods regarding the date and place of his birth; he gives only the briefest mention to the falsehoods regarding his wartime residences and occupations.

oath and his submission of falsified documents to United States government officials were not "material" and therefore cannot provide the basis for his denaturalization. As we explain below, Congress could not have intended, and this Court's decisions in no way hold, that a person who has so totally disregarded the requirements for obtaining benefits under the immigration laws should be entitled to retain his citizenship.

1. The leading case on materiality under Section 1451(a) is *Chaunt* v. *United States*, *supra*. Petitioner contends (Pet. Br. 9-20) that the Court in *Chaunt* established only one test for determining materiality and that the two prongs articulated in that opinion require essentially the same showing—that the applicant necessarily would have been disqualified from citizenship (or from obtaining a visa) if the government had received truthful and complete answers to its questions. But *Chaunt* by its terms did just the opposite: it set forth two alternative tests for materiality, only one of which required proof of ultimate disqualifying facts.

The government in the *Chaunt* case had sought to denaturalize a citizen because he had concealed, in his 1940 citizenship application, three arrests in 1929 and 1930 for handbilling, illegal demonstration, and breach of the peace. The statute in effect at the time[19] provided that an applicant for citizenship must have behaved as a person of good moral character during the previous five years. Although the arrests were more than five years old, the government argued that if it had known of those arrests, it would have conducted an investigation and would have learned of Chaunt's position as a Communist Party official, an affiliation that presumably would have disqualified him from citizenship.

This Court reversed the district court's order revoking citizenship. At the outset, the Court explained that "[f]ailure to give frank, honest, and unequivocal an-

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[19] Section 4 of the Naturalization Act of 1906, ch. 3592, 34 Stat. 596-598, as amended by Act of Mar. 2, 1929, ch. 536, § 6, 45 Stat. 1513-1514 (now 8 U.S.C. 1427(a)).

swers • • • is a serious matter" because "[s]uppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. *Or disclosure of the true facts might have led to the discovery of other facts which justify denial of citizenship.*" 364 U.S. at 352-353 (emphasis added). The Court then went on to reject the government's contention that truthful answers from Chaunt would have prompted an investigation that might have revealed that Chaunt was a Communist Party official in 1929. It noted (*id.* at 355) that the government was aware of other possible indicia of Communist Party affiliation, such as his membership in the International Workers' Order (IWO), which the Court assumed to be a Communist organization. Yet Chaunt's disclosure of his IWO membership had not prompted an investigation into his political affiliations. The Court was unwilling to believe that the "tenuous line of investigation that might have led from the arrests to the alleged communistic affiliations" was really material in light of the government's inaction when faced with more substantial evidence of the same affiliation (*ibid.*).

The Court emphasized, however, that a different case would have been presented if the arrests had involved "moral turpitude or acts directed at the Government, [or] conduct which even peripherally touched types of activity which might disqualify one from citizenship" (364 U.S. at 354). It also indicated that if Chaunt had not disclosed his IWO affiliation, the "failure to report the arrests would have had greater significance," because a forceful argument could then be made that his failure to disclose the arrests was "part and parcel of a project to conceal a Communist Party affiliation" (*id.* at 355). On the facts before it, however, the Court concluded that the government had failed to show "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) *that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship*" (*ibid.* (emphasis added)).

As the quoted language reveals, the Court in *Chaunt* established two alternative tests for determining the materiality of misrepresentations or concealments, and proof of disqualifying facts is not required under the second test.[20] Although the Court's language is not entirely free of ambiguity, we submit that under the second prong, denaturalization is authorized for misrepresentations even though truthful answers regarding the misrepresented facts would not necessarily have required that result but simply might have required it.

Our interpretation of *Chaunt* is consistent with the established rule prior to *Chaunt*, which *Chaunt* did not purport to disturb. Thus, in cases that discussed the materiality requirement prior to *Chaunt*, the courts did not require proof of ultimate disqualifying facts. See, *e.g.*, *Corrado* v. *United States*, 227 F.2d 780 (6th Cir. 1955), cert. denied, 351 U.S. 925 (1956) (noting that "the issue [was] not whether naturalization would have been denied • • • but whether, by his false answers, the Government was denied the opportunity of investigating [his] moral character • • • and the facts relating to his eligibility for citizenship"); *United States* v. *Montalbano*, 236 F.2d 757, 759-760 (3d Cir.), cert. denied, 352 U.S. 952 (1956); *Granduxe y Marino* v. *Murff*, 183 F. Supp. 565, 567 (S.D.N.Y. 1959), aff'd, 278 F.2d 330 (2d Cir.), cert. denied, 364 U.S. 824 (1960); *United States* v. *Chandler*, 152 F. Supp. 169, 177 (D. Md. 1957); *United States* v. *Lumantes*, 139 F. Supp. 574, 575 (N.D. Cal. 1955), aff'd, 232 F.2d 216 (9th Cir. 1956).

This Court has never reconsidered the language in *Chaunt* establishing the two tests for materiality. In *Fedorenko* v. *United States*, *supra*, the Court found it unnecessary to decide whether the court of appeals was

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[20] Indeed, petitioner apparently concedes (Pet. 8) that the literal language of the second *Chaunt* test supports the interpretation we propose. The leading immigration law treatise also concurs in our reading of *Chaunt*. See 3 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 20.4h, at 20-14 (1986).

correct when it applied the same materiality test that we urge here. The defendant in that case had served as an armed guard at the Treblinka concentration camp. Because those activities would have made petitioner ineligible for a visa as a matter of law under the Displaced Persons Act of 1948 (DP Act), Pub L. No. 80-774, ch. 647, 62 Stat. 1009 *et seq.*, regardless of whether his service was voluntary or involuntary, the Court concluded that his misrepresentations about his wartime activities were material and warranted his denaturalization.[21] See also *Costello* v. *United States*, *supra* (upholding denaturalization of applicant who concealed occupation as a bootlegger; Court resolved case under first *Chaunt* test and therefore did not construe the second test).

Most of the lower court decisions since *Chaunt* have agreed with us that the government need not establish some ultimate disqualifying fact in order for a misrepresentation to be material. For example, in *United States* v. *Oddo*, 314 F.2d 115, 118 (2d Cir.) (Marshall, J.), cert. denied, 375 U.S. 833 (1963), the court noted that the failure to disclose a record of prior arrests was material, "even though none of those arrests by itself would be a sufficient ground for denial of naturalization," because the concealment "closes to the Government

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[21] Three members of the Court wrote separately in *Fedorenko* to express their understanding of *Chaunt*. Justice Blackmun, in a concurring opinion, concluded that even under the second test in *Chaunt*, the government must establish some ultimate disqualifying fact in order for the misrepresentation at issue to be material. 449 U.S. at 518-526. Justice Stevens, in dissent, concluded that the *Chaunt* test requires proof that a truthful answer would have led to an investigation and that a disqualifying circumstance actually existed. If the government could establish the existence of a disqualifying fact, according to Justice Stevens, it would be entitled to a presumption that an investigation begun at the time would have disclosed that fact. 449 U.S. at 530-538. Justice White, also in dissent, rejected the view that the second *Chaunt* test requires proof of ultimate disqualifying facts. His view was that it is enough if the government can show that a visa "might" have been denied as a result of an investigation. 449 U.S. at 526-530.

an avenue of inquiry which might conceivably lead to collateral information of greater relevance." Accord, *e.g.*, *United States* v. *Palciauskas*, 734 F.2d 625 (11th Cir. 1985); *United States* v. *Koziy*, 728 F.2d 1314, 1320 (11th Cir.), cert. denied, 469 U.S. 835 (1984); *Kassab* v. *INS*, 364 F.2d 806 (6th Cir. 1966) (adopting an even more lenient test for materiality, requiring the government to show only that the disclosure might have led to an investigation that might have resulted in the denial of citizenship); *Langhammer* v. *Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961). Contra, *United States* v. *Sheshtawy*, 714 F.2d 1038 (10th Cir. 1983); see also *La Madrid-Peraza* v. *INS*, 492 F.2d 1297 (9th Cir. 1974).[22]

2. We submit that our interpretation of the materiality test best balances the two important competing interests: the naturalized person's strong interest in retaining his citizenship and the government's equally strong interest in ensuring that visa and citizenship applicants provide truthful information. As the lower courts both before and after *Chaunt* have recognized, a materiality standard of the sort suggested by petitioner would seriously interfere with the enforcement of the immigration laws.

A standard requiring proof that the applicant would have been denied entry or citizenship if he had answered truthfully gives the applicant every incentive to conceal information when he believes that the information could adversely affect his visa application or naturalization petition. *Fedorenko*, 449 U.S. at 529 (White, J., dissent-

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[22] The Attorney General, who is charged with the administration of the immigration laws and whose rulings on questions of law are controlling within the Executive Branch under 8 U.S.C. 1103(a), has also read *Chaunt* to sanction denaturalization even in the absence of proof of ultimate disqualifying facts. He issued a ruling in that regard (in the deportation context) shortly after *Chaunt* was decided. *See In re S- and B-C-*, 9 I. & N. Dec. 444, 447 (1961) (the government may satisfy the materiality requirement either by proving ultimate disqualifying facts or by showing that the misrepresentation "tend[ed] to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded").

ing). In many cases, the lie will never be discovered, and the applicant will retain his fraudulently obtained citizenship without a challenge. Even if his deception is eventually uncovered, the applicant is better off in at least two ways for having lied. First, the passage of time invariably makes it more difficult for the government to uncover disqualifying facts. Essential witnesses may have died and memories will have faded. Second, the burden of proof shifts to the government. At the time he applies for citizenship, the applicant bears the burden of "show[ing] his eligibility for citizenship in every respect" (*Berenyi* v. *District Director*, 385 U.S. 630, 637 (1967)). At the denaturalization stage, however, the government can prevail only if it establishes proof of ineligibility by clear, unequivocal, and convincing evidence (*Schneiderman*, 320 U.S. at 125, 158). Anyone with even the slightest fear that something in his past might disqualify him from citizenship would therefore have every incentive to lie about his past and to provide false biographical information.

3. In addition to being contrary to the policy of the immigration laws, petitioner's interpretation of the materiality requirement is inconsistent with both the language of Section 1451(a) and its legislative history. Section 1451(a) provides two separate grounds for denaturalization: (1) illegal procurement and (2) willful concealment or misrepresentation of a material fact. Citizenship is illegally procured if a necessary prerequisite to naturalization is absent at the time the petition for naturalization is granted. *Fedorenko*, 449 U.S. at 506, 515. Yet to establish facts warranting denial of citizenship, as petitioner's proposed standard would require, the government would have to prove that at the time he applied for citizenship, the individual lacked some essential prerequisite for naturalization—the same proof that is required to show illegal procurement. If, in order to establish a material misrepresentation, the government must first make a showing sufficient to prove illegal procurement, then the misrepresentation provision of the statute is wholly redundant. Put another way, if

individuals may be denaturalized only when it is shown that they were ineligible for citizenship in the first place, then their behavior in making misrepresentations during the naturalization process, no matter how egregious, is of no separate significance for denaturalization purposes. Petitioner's interpretation thus would violate the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979).

Moreover, petitioner's standard conflicts with the legislative history of Section 1451(a), which demonstrates a firm congressional intent to use the denaturalization process to discourage false statements by visa and citizenship applicants. Before 1952, the predecessor to Section 1451(a) provided that a naturalization certificate could be revoked either because the certificate was "illegally procured" or "on the ground of fraud." 8 U.S.C. (1940 ed.) 738(a). The Senate Judiciary Committee in 1950 pointed out that litigation over extrinsic versus intrinsic fraud had hampered the prosecution of denaturalization cases. See S. Rep. 1515, 80th Cong., 1st Sess. 755-758 (1950). The committee therefore recommended that the denaturalization provision include a false statement provision in place of the reference to fraud because "proof of 'concealment of a material fact or * * * willful misrepresentation' is more easily proved than is an allegation of fraud and illegality." *Id.* at 769. The 1952 Act adopted the Senate Committee's proposal. See S. Rep. 1137, 82d Cong., 2d Sess. 45 (1952). By rendering the "misrepresentation" provision redundant, petitioner's proposed standard of materiality would therefore be squarely contrary to the congressional purpose of expanding the grounds for denaturalization, which was the reason for including the misrepresentation provision in the 1952 Act.

4. Petitioner's proposal would also result in the anomaly that the standard for materiality in the denaturalization setting would be more exacting than the standard in a criminal prosecution for perjury or false state-

ments. Petitioner has pointed to nothing in the legislative history or policies underlying the immigration laws to suggest that Congress could have intended such a result.

Congress's failure to provide any definition of "materiality" in Section 1451(a) suggests that the word should be given its ordinary meaning. See, *e.g.*, *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981). Numerous criminal statutes contain materiality requirements,[23] and the meaning of materiality in the criminal context is both well settled and consistent with the interpretation we propose.

Because of its investigative function, the grand jury performs a role analogous to that of the vice consul or naturalization examiner in reviewing an application for a visa or for citizenship. A false statement before a grand jury is material if it is "*capable* of influencing the tribunal" or if it "would have the natural effect or *tendency* to influence, impede, or dissuade the Grand Jury from pursuing its investigation." *United States* v. *Gremillion*, 464 F.2d 901, 905 (5th Cir.) (emphasis added), cert. denied, 409 U.S. 1085 (1972). Moreover, because the purpose of the grand jury's investigation is a factfinding one, "leads to additional facts may be material even though they do not reflect on the ultimate issue being investigated." *United States* v. *Lardieri*, 497 F.2d 317, 319 (3d Cir. 1974).

Various criminal statutes penalize false statements to government officials, including immigration authorities. The materiality standard under those statutes does not require a showing that disclosure of the true facts would necessarily have led to a different result. For example, the general federal false statements statute, 18 U.S.C. 1001, provides that it is a crime to make a false state-

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[23] *E.g.*, 18 U.S.C. 1621 (false statement under oath as to a "material matter"); 18 U.S.C. 1623 (false "material declaration" before a court or grand jury); and 18 U.S.C. 1001 (concealment of a "material fact" in a matter within the jurisdiction of a department or agency of the United States).

ment or use a false document
jurisdiction of any departme
States."[24] In *United States*
(11th Cir. 1984), the defend
lating Section 1001 by givin
date of birth and using fals
passport. The court explained
under Section 1001 if it "has
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v. *Lopez*, 728 F.2d 1359, 13
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specific falsification did not e
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F.2d 725, 729 (9th Cir. 19
Section 1001 for submitting
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consulate authorities in the
granting immigrant visas to
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402 F.2d 163, 168 (9th Cir
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[24] This provision applies to mis
United States government. See
U.S. 503, 505 (1955).

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Accord, *e.g.*, *United States*
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nited States v. *Valdez*, 594
9) (in prosecution under
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In addition, visa applica
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e.g., *United States* v. *Flores*
Cir. 1956) (false statement
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answer *might* have induced
an investigation which *mig*
refusal of the visa" (*id.* at
cases)).[25]

There is no reason to as
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Petitioner's position would
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[25] Another criminal statute, 18
crime to possess or receive an i
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1546 likewise does not require pr
proof that the false statement wa
See *United States* v. *Al-Kurna*, N
In *United States* v. *Wiggan*, 67
456 U.S. 1011 (1982), the court
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capable of influencing the agency.
. 86-3402 (5th Cir. Jan. 15, 1987).
F.2d 145 (6th Cir.), cert. denied,
noted (*id.* at 147) that "the Con-
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tion. Petitioner has cited no authority—and we know of none—to support the proposition that the loss of citizenship, as precious as that right may be, is entitled to greater protection than the loss of liberty accompanying a criminal conviction. To the contrary, the courts in denaturalization cases have consistently treated the criminal standard as the *maximum* standard against which to set standards for denaturalization. See, *e.g.*, *Schneiderman*, 320 U.S. at 160 ("A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status.").

5. In *Fedorenko*, this Court raised but did not resolve the issue whether the *Chaunt* standard for materiality governing misrepresentations at the naturalization stage should also apply to misrepresentations made at the visa stage, the point at which petitioner made his first false statements (449 U.S. at 508-509). We know of no court that has applied a different standard at the visa stage than at the naturalization stage,[26] and we submit that the reasons for adopting our proposed materiality standard apply *a fortiori* at the visa stage.

The need for a standard that encourages honesty and full disclosure is greatest at the visa stage. Under the 1952 Act, as under the 1924 Act, the inquiry undertaken by a consular officer is wide-ranging. When a vice consul inquires into an alien's eligibility for a visa, that inquiry covers virtually every phase of the alien's life.[27] Additional complications arise out of the locale of the consulate at which the application is made. Relations

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[26] See *Maikovskis* v. *INS*, 773 F.2d 435, 441 (2d Cir. 1985) (citing numerous authorities applying *Chaunt* test in context of visa misrepresentations), cert. denied, No. 85-1483 (June 16, 1986).

[27] The 33 separate categories of ineligibility for aliens seeking a visa require a vice consul to inquire, inter alia, into the alien's mental and physical health (8 U.S.C. (& Supp. III) 1182(a)(1)-(7)); financial stability (8 U.S.C. 1182(a)(8) and (15)); marital status (8 U.S.C. 1182(a)(11)); political views (8 U.S.C. 1182(a)(27)-(29)); and service on behalf of the regime of Nazi Germany (8 U.S.C. 1182(a)(33)).

between the United States and the alien's country may range from cordial to hostile. A vice consul may not have access in a foreign country to evidence, such as official documents or witnesses, that is necessary to verify the facts offered by an applicant. Because a vice consul lacks the time and resources to undertake an exhaustive inquiry into each applicant's bona fides, he must place considerable reliance on an applicant's statements and credibility. Moreover, an applicant's incentive to lie is greatest at the visa stage, since there is virtually no judicial review of decisions denying visas. See, *e.g.*, *Ventura-Escamilla* v. *INS*, 647 F.2d 28, 31 (9th Cir. 1981) (citing authorities). All of these factors highlight the importance of requiring a visa applicant to be completely truthful when applying to enter this country. It follows that the government should not be required to show that a misrepresentation at the visa stage *would* have uncovered a fact warranting denial of the visa but only that an investigation *might* have uncovered such a fact.

B. Petitioner's Misrepresentations Were Material Under Any Standard

1. *Discovery of the True Facts Would Have Led to an Investigation*

Former Vice Consul Finger, who processed visa applications in Stuttgart at the time petitioner submitted his application there, testified that information relating to an applicant's identity and wartime activities was reviewed with special care (J.A. 189, 198-199). That procedure was required because, in addition to the normal quota requirements, the American consulate in Stuttgart was issuing visas only to persons who had immediate relatives living in the United States and those who could prove they had been victims of Nazi persecution (J.A. 187, 197, 213-214, 217-218). Had petitioner been truthful with the consular officials at the visa stage when he was questioned under oath, an investigation clearly would have ensued because the officials would have dis-

covered the discrepancy between his truthful statements at that time and his previously submitted falsified documents. As the court of appeals noted (Pet. App. 31a), Finger gave "unrebutted testimony" concerning what would happen if there were discrepancies between the supporting documents and the visa application. Finger specifically testified that if an applicant gave information in his application or during his interview that was inconsistent with information in his supporting documents, an investigation "certainly would have" been conducted (J.A. 199-200). In fact, such an investigation was mandated by regulations that were in effect at the time (22 C.F.R. 61.329 (1946); see Pet. App. 31a).

According to Finger, the vice consul "would first check police records in any prior places of residence, particularly in Germany where such records were available" (J.A. 199). He would also check lists of rejected visa applicants and might make inquiries of the sponsoring agencies (*ibid.*). In addition, he might interview individuals in displaced persons camps (J.A. 212) and other individuals who knew the applicant (J.A. 212-213).

A field investigation may not even have been necessary, since it appears that the discovery of discrepancies between petitioner's statements to the vice consul and his falsified documents would have resulted in denial of his visa even without an investigation. Finger's testimony (J.A. 199-204) revealed that if an applicant gave conflicting information about his date and place of birth, wartime occupation, or wartime residence, his visa application would simply be denied outright.[28] Based on

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[28] Finger's testimony is supported by several court decisions rendered prior to 1947 holding that misrepresentations as to identity were material per se to visa and naturalization decisions. See, *e.g.*, *McCandless* v. *United States ex rel. Murphy*, 47 F.2d 1072 (3d Cir. 1931); *In re Zychole*, 43 F.2d 438 (E.D. Mich. 1930); *United States* v. *Shapiro*, 43 F. Supp. 927, 930 (S.D. Cal. 1942); *United States* v. *Goldstein*, 30 F. Supp. 771, 773 (E.D.N.Y. 1939); see also *United States ex rel. Karpay* v. *Uhl*, 70 F.2d 792 (2d Cir.), cert. denied, 293 U.S. 573 (1934) (making false statements concerning marital status under oath in a naturalization proceeding con-

that evidence, the government established materiality even under the first prong of *Chaunt*.

Similarly, if petitioner had perpetuated his false identity throughout the visa stage but disclosed the true facts at the naturalization stage, there would, at a minimum, have been an investigation. As the court of appeals noted, the undisputed testimony of petitioner's naturalization examiner, former Immigration Judge Goldberg, revealed that if petitioner had told the truth when he applied for citizenship, "the discrepancies between the truth and his visa materials would have resulted in either a field investigation or an outright denial of the petition" (Pet. App. 36a). See J.A. 169-171 (testimony of Judge Goldberg).[29]

Faced with unrebutted testimony that his truthful testimony would have triggered an investigation—or outright denial of a visa or citizenship application—because of the discrepancies that would have been revealed, petitioner argues (Pet. Br. 13-14) that in assessing materiality at any particular point in time, a court must presume a clean slate and must hypothesize that no prior false statements were ever made. According to petitioner, the issue is whether being born in 1915 rather

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stitutes crime of moral turpitude warranting deportation). Since that time, misrepresentations regarding identity have continued to be considered highly material to visa or citizenship determinations. See *United States* v. *DeLucia*, 256 F.2d 487, 490 (7th Cir.), cert. denied, 358 U.S. 836 (1958); *London* v. *Clarke*, 239 F.2d 631, 634 (1st Cir. 1956); see also *United States* v. *D'Agostino*, 338 F.2d 490, 491 (2d Cir. 1964); 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 4.7c, at 4-62 (1996) (concealment of identity "usually has been deemed material since identity is crucial to the application for entry and deception frustrates inquiry"). Congress has clearly indicated the importance it places on facts going to identity; both Section 7 of the 1924 Act and Section 1202 of the current statute specifically require applicants for visas to provide accurate biographical data, including date and place of birth.

[29] Despite extensive testimony by Judge Goldberg in this regard, the district court failed to consider whether, if petitioner had told the truth at the naturalization stage, after having lied at the visa stage, an investigation would have occurred.

than in 1913 or in Reistru rather than Kaunas would have made him ineligible per se, not whether discrepancies concerning his asserted date or place of birth would have been important (*ibid.*). But the issue cannot be analyzed in a vacuum; to do so would be to ignore the realities of the visa and citizenship procedures, as described by both Finger and Goldberg. As those officials explained, a truthful statement about a fact as fundamental as date or place of birth can take on great importance when it conflicts with the person's prior statements or with his previously submitted documents.[20] Petitioner should not be allowed to rewrite the record by asking a court to assume that he made no previous false statements and that he submitted no falsified documents.[21]

More fundamentally, petitioner's approach, taken to its logical conclusion, leads to the absurd result that a visa or citizenship applicant could adopt and maintain throughout the process a totally false identity, including a fictitious date of birth, place of birth, residence, occupation, and even a fictitious name. Under petitioner's

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[20] Indeed, under Section 7(c) of the 1924 Act and the applicable regulations (22 C.F.R. 61.327(e), (f), and (g) (1946)), petitioner should have supplied to consular officials all the documents in his possession or available to him going to his identity. Had he provided all such documents there would have been obvious discrepancies even among the documents themselves.

[21] Petitioner suggests (Pet. Br. 14) that his approach is correct because someone who is going to tell the truth "obviously" would do so consistently throughout the proceedings. But this point is anything but obvious; a witness may well decide to tell the truth, notwithstanding his previous submission of false documents, when he is forced to testify under oath. Alternatively, he may be careless in looking over his falsified documents, or he may simply have forgotten the exact content of his prior lies. In this regard, we note that during his interview under oath with government attorneys in 1981, petitioner gave two completely different accounts about whether he had previously lied about his date and place of birth. See pages 9-10, *supra*; *United States* v. *D'Agostino*, 338 F.2d 490 (2d Cir. 1964) (inconsistent statements to naturalization officials concerning marital status).

theory, he would face no risk of denaturalization unless the government could show, decades later, that his true name, date of birth, residence, and occupation would per se have disqualified him.[32] As a practical matter, this would mean that an applicant for a visa or for citizenship could assume a totally false identity with impunity and thereby ensure that the authorities would be unable to investigate his past. But as this Court has stated (*Berenyi* v. *District Director*, 385 U.S. at 638), "[t]he Government is entitled to know of any facts that may bear on an applicant's statutory eligibility for citizenship, so that it may pursue leads and make further investigation if doubts are raised." Congress could not possibly have intended the approach urged by petitioner, in which a person who assumed a completely false identity could not be denaturalized.

The district court erroneously adopted petitioner's approach. According to that court, the issue was whether petitioner's birth in 1915 in Reistru, his residence in Kedainiai during 1940-1942, or his employment at a small factory were "facts which, if known, would have warranted denial of citizenship" (Pet. App. 135a). The court concluded (*id.* at 136a) that there was nothing that would "excite suspicion" in the fact that defendant had those particular biographical attributes.

By focusing only on the false statements themselves, the district court asked the wrong question in assessing whether the true facts would have provoked an investigation. The court of appeals, by contrast, asked the correct question, namely, whether discrepancies between true information on petitioner's visa application and the misrepresentations in his falsified documents would have resulted in an investigation by the consular officials (Pet. App. 29a). At the naturalization stage, as the court of

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[32] As petitioner suggests (Pet. Br. 7), disqualification would ordinarily be possible only if a person lied about his *country* of birth and thereby became eligible under a different country's quota when he would not have been eligible under the quota applicable to his own country.

appeals likewise recognized (*id.* at 36a), the correct question is whether truthful information by petitioner on these basic matters, in the face of inconsistent information at the visa stage, would have triggered an investigation by the naturalization examiner. Under this analysis, the answer is clear: there would, at a minimum, have been an investigation at both the visa and naturalization stages if petitioner had revealed the truth and had thereby contradicted his prior false statements.

Because the district court applied an erroneous legal analysis, there is no merit to petitioner's contention (Pet. 14-15; Pet. Br. 5, 8-9, 28-30) that the Third Circuit improperly engaged in de novo review of the district court's finding that no investigation would have been conducted if petitioner had told the truth. The Third Circuit simply applied the correct legal analysis to the undisputed facts, as it is permitted to do. See, *e.g.*, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982).

2. *The Investigation Would Likely Have Led To the Discovery of Disqualifying Facts*

Because the district court erroneously concluded that no investigation would have ensued as a result of petitioner's misrepresentations, it did not consider whether it was likely that an investigation would have led to the discovery of disqualifying facts (Pet. App. 134a-137a). The record demonstrates, however, that the government met its burden of proof under the "might" standard that we propose, under the "probable" standard applied by the court of appeals, and even under the "would" standard urged by petitioner.

a. *The Investigation Would Have Resulted in the Denial of Petitioner's Visa Application Because of Falsified Information Concerning His Identity*

Ambassador Finger's unrebutted testimony established that if an investigation had ensued, petitioner's visa would have been denied because of his misrepresentations concerning his identity (J.A. 200-202). Specifically, Fin-

ger testified that if a vice consul became aware that an applicant lied about his date and place of birth but prior to submitting his application had told the German authorities the truth about those matters, his visa would have been denied (J.A. 202). Similarly, if an applicant submitted falsified documents and withheld documents containing the true information, the visa would be denied (J.A. 200). Since the vice consul would have checked the German police records (J.A. 199) and made other pertinent inquiries (J.A. 199, 212), he clearly would have discovered, as the government did decades later, that petitioner had repeatedly given his correct biographical information (and documentation reflecting that information (J.A. 61-63)) to the German authorities. Based on his false statements and documents to American consular officials, petitioner's visa therefore would have been denied.

b. *The Investigation Probably Would Have Led to the Discovery of Facts Resulting in the Denial of Petitioner's Visa or Petition for Naturalization on the Ground that Petitioner was not a Victim of Persecution*

As the court of appeals noted (Pet. App. 30a), Ambassador Finger gave unequivocal testimony (see J.A. 187, 197, 205, 213-214, 217, 233) that the policy of the Stuttgart consulate was that visas were to be given only to those with close relatives in the United States and those who had been victims of Nazi persecution.[23] Finger, who served at Stuttgart at the time petitioner obtained his visa, had previously received training in processing visas at the State Department's Visa Division (J.A. 182-184). Since his testimony was based on his own firsthand knowl-

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[23] Finger testified that such a policy was set forth in regulations (J.A. 218, 227-228). Although the district court noted that Finger was "in error on this point," the court recognized that "perhaps there was an informal policy at the Stuttgart consulate to prefer Nazi victims" (Pet. App. 119a-120a n.7). Petitioner misstates the record in suggesting (Pet. Br. 7, 16-17) that the district court rejected Finger's testimony concerning the policies for issuing visas in Stuttgart.

edge of the policies and practices at Stuttgart concerning visa eligibility, his testimony is entitled to great weight. See generally *Fedorenko*, 449 U.S. at 510-511.

Petitioner asserts (Pet. Br. 31-46) that Finger's recollection concerning the policies for issuing visas was erroneous. In fact, however, his testimony is confirmed by the legislative history of the DP Act, which took effect in June 1948, after petitioner applied for and obtained his visa. The DP Act was passed because emigres from areas such as the Baltic states, including Lithuania, had been unable to enter the United States under the stringent quota standards of the 1924 Immigration Act. See S. Rep. 950, 80th Cong., 2d Sess. 20-21, 24 (1948). Prior to the enactment of the DP Act, the quota immigrant visas for eastern European countries were going almost exclusively to Jews, persons who by definition were victims of Nazi persecution. See *id.* at 26; *Hearings on H.R. 2910 Before the Subcomm. on Immigration and Naturalization of the House Comm. on the Judiciary*, 80th Cong., 1st Sess. 407 (1947); 94 Cong. Rec. 7861 (1948) (remarks of Rep. Lesinski).

In light of the fact that non-Jewish eastern European emigres were generally unable to obtain visas in 1947, petitioner cannot sustain his claim (Pet. Br. 31-38) that Finger simply fabricated the policy of the consulate in Stuttgart that nonpreference visa applicants had to establish that they had been victims of Nazi persecution. Finger was speaking accurately based on personal experience, and the Third Circuit properly relied on his testimony.

Indeed, petitioner's own conduct at the time he applied for a visa provides support for Finger's testimony. When applying for his visa, petitioner submitted a certificate issued by the central committee of the "Lithuanian Ex-Political Prisoners Nazi Victims" stating that he had been "persecuted by the gestapo" (J.A. 29).[34] If, as peti-

[34] Although the version reprinted in the Joint Appendix does not so reflect, the actual document submitted by petitioner was

tioner claims, there had been no requirement of proving persecution by the Nazis, such a certificate would have been unnecessary. Petitioner submitted several other fraudulent documents establishing his false date and place of birth (J.A. 27, 37, 38), so that the certificate certainly was not necessary as evidence of his identity. The only substantive fact addressed by the certificate was petitioner's purported underground activities and persecution by the Gestapo. Obviously, petitioner himself believed that establishing persecution by the Nazis was important to obtaining a visa. As the court of appeals noted (Pet. App. 31a), "by submitting this document [petitioner] attempted to prove that he was a victim of Nazi persecution."

Petitioner offers several grounds for challenging the court of appeals' reliance on Finger's testimony, but each lacks merit. First, petitioner relies (Pet. 21 n.12, 23; Pet. Br. 43) on remarks by Frank Schilling, the vice consul who actually processed petitioner's visa application, which purportedly conflict with Finger's statements. To begin with, petitioner fails to note that the remarks by Schilling were not testimony but were statements to petitioner's counsel over the telephone in a conversation to which neither the government nor the court was a party. More importantly, petitioner has quoted Schilling out of context and has distorted what Schilling actually said. Schilling repeatedly made clear that he had no

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entitled "Nazi victims" and contained a stamp to that effect (C.A. Exh. 9). Petitioner's witness, Vydaudas Vidiekunas, the person who signed that document, conceded (C.A. App. 1106-1107) that the language of the document was misleading and should have indicated only that the subject faced a *risk* of persecution. Moreover, Vidiekunas had no personal knowledge that petitioner faced even that *risk*, let alone actual persecution. He signed the form based on comments by two individuals; one of the two was deceased, and Vidiekunas could not recall the identity of the other (*id.* at 1118-1119).

recollection of *any* of the requirements for a visa.[35] His statements therefore do not in any way rebut Finger's testimony about the existence of specific visa requirements.

Second, petitioner relies on a variety of documentary materials (Pet. Br. 33-36)[36] to support his attack on Finger's testimony. But those materials establish no more than that petitioner could have been characterized

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[35] According to petitioner, the pertinent colloquy was as follows (Pet. Br. 43 (quoting J.A. 175)):

> Former Vice Consul Frank Schilling was asked by petitioner's counsel: "Let me ask you rather pointedly, whether or not in order to gain an immigration quota visa you had to have been in fact a victim of Nazi persecution?" and he answered: "No. That I don't remember."

When Schilling's remarks are read in context, however, they take on a totally different meaning (J.A. 175 (emphasis added)):

> DJW [petitioner's attorney]—Well I have the regulations, and the regulations, of course, indicate that at the time that the priorities were given to displaced persons but were there any other criteria as to which—
>
> FS [Schilling]—Not that I remember. *I don't remember any of the qualifications at all that were necessary. That's a long while ago.*
>
> DJW—Let me ask you rather pointedly, whether or not in order to gain an immigration quota visa you had to have been in fact a victim of Nazi persecution?
>
> FS—No. That I don't remember *either.*
>
> DJW—You have no recollection that there was any such policy?
>
> FS—That's right.
>
> DJW—Do you have any recollection as to what the nature would have to have been of a person's occupation in one of the occupied countries in order to make him ineligible?
>
> FS—No. I have no recollection at all on that.
>
> DJW—Were you ever interviewed by any of the attorneys for the Dept. of Justice in connection with this case?
>
> FS—No I had a couple of telephone calls, that's all. *I offered no information just like I'm not offering any information now because I have no recollection of what happened at that time.*

[36] Most of the cited materials were submitted by the Ukrainian Bar Association in an amicus brief in support of the petition for a writ of certiorari and are not part of the record.

as a "displaced person" in the post-war period, according to several definitions of the term. The materials do *not* undermine Finger's testimony that the policy of the American consulate was to give visa priority to victims of Nazi persecution.[37]

Third, petitioner claims (Pet. 23-24; Pet. Br. 44-45) that he was not put on notice concerning this issue and therefore did not realize the need to put on evidence regarding the requirements for obtaining a visa in 1947. The lack of notice, he claims, deprived him of due process. Petitioner's argument is patently without merit. The complaint put petitioner on notice that he had obtained his citizenship through misrepresentations concerning his date of birth, place of birth, wartime residence and wartime occupation (J.A. 13-14, 16-18). The government attorney, in his opening statement at trial, specifically identified the government's theory that petitioner misrepresented himself to be a victim of persecution (C.A. App. 210-211, 212); Finger's testimony focused at length on the requirement that a person had to be a victim of persecution to obtain a nonpreference visa (J.A. 187, 197, 205, 213-214, 217, 218, 233); the government's evidence on the issue was relied upon by the government attorney at the close of his case in response to petitioner's motion to dismiss under Fed. R. Civ. P. 41(b) (C.A. App. 1071), and petitioner responded to the argument without claiming lack of notice (*id.* at 1074).[38] Petitioner introduced evidence on that issue,[39] and the issue

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[37] Although petitioner refers (Pet. Br. 36) to the 28,789 European displaced persons who were granted visas by November 1947, even petitioner's source reveals that only 555 of those visas had gone to persons of Lithuanian nationality. Ukrainian Amicus Br. App. 38a.

[38] Indeed, the court suggested to petitioner that he might wish to submit evidence on the issue as part of his affirmative case (C.A. App. 1074).

[39] That evidence included testimony from Stephen Zobarskas, a Lithuanian emigre who obtained a visa from Finger. Zobarskas testified that he was not a victim of persecution but that he nonetheless obtained a visa. C.A. App. 1160-1164, 1168-1169. Yet

was the subject of discussion in the government's post-trial brief (at 24, 31) and petitioner's post-trial brief (at 40-41) submitted to the district court. Moreover, both briefs to the courts of appeals addressed the issue (Gov't C.A. Br. 25-26; Pet. C.A. Br. 52-53), and the issue was discussed at oral argument (see Pet. App. 33a n.10). In short, there is no basis for petitioner's claim that the court of appeals somehow invented a new issue.

The court of appeals correctly held (Pet. App. 32a) that an investigation probably would have shown that petitioner was not a victim of persecution. Specifically, if the vice consul had learned of petitioner's true date and place of birth and had thereby discovered the discrepancy between his visa application and his previously submitted documents, the investigation would likely have taken several directions. First, as Finger testified (J.A. 199), a check would have been made with the authorities in the German cities in which petitioner had previously resided. Records from the Tuebingen district would have revealed that petitioner and his wife had lived under their own names in Nazi Germany since late 1944 (see J.A. 56, 59). Rather than being a forced laborer or being forced to live in a Nazi refugee camp, he had been granted the right to live without restrictions in the areas of Wuerttemberg and Hohenzollern (J.A. 59). Moreover, petitioner's wife had applied to the Wuerttemberg Minister of the Interior under her own name to practice dentistry (J.A. 57). These facts would have placed in doubt petitioner's claim that he had been a victim of Nazi persecution, since a victim of persecution would neither have applied for nor received the special considerations extended to petitioner and his wife

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Zobarskas's alien foreign registration form, which was submitted as part of his visa application, reflected that he represented himself to be a "forced laborer" (GX V1; C.A. Exh. 1275). See J.A. 227 (testimony of Finger that a forced laborer qualified as a victim of persecution). Moreover, Zobarskas acknowledged that Finger had asked him whether he was a victim of persecution (C.A. App. 1168). Thus, Zobarskas's case turned out to corroborate Finger's testimony.

by the Nazis (see Pet. App. 32a). Finally, the vice consul would immediately have realized that the sole piece of evidence submitted to the immigration authorities that supported petitioner's claim to be a victim of persecution was fraudulent in that it contained a false date and place of birth.

A second likely course of investigation would have been at Tuebingen University. A review of records there would have disclosed that petitioner had submitted to the University, but not to the consulate, a Lithuanian document from the Telsiai Seminary that stated his correct date and place of birth (J.A. 61-63). This fact would have shown that he was withholding from immigration officials identity documents from the country to which he owed allegiance. The Tuebingen records would additionally have revealed that petitioner told the German authorities that he had been a manager of an industrial concern during the Nazi occupation of Lithuania (J.A. 65; C.A. Exh. 547), while concealing that employment on his alien registration form (J.A. 34-35). At trial, petitioner explained that this discrepancy was the result of a mere "exaggeration" (Lodging Tr. 863-864).[40] This explanation, however, came over 35 years too late. It is not the courts today, but the vice consul in 1947, who should have been given the opportunity to decide whether petitioner's concealment of his true employment position under Nazi rule was inconsistent with a claim of having been persecuted by the Gestapo.[41]

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[40] We note the irony that petitioner can now explain this damaging document (J.A. 65) only by stating that he committed yet another lie.

[41] Finger indicated (J.A. 211) that even managing 15 employees "would have raised some questions in [his] mind, and [he] might have made further oral inquiry about [petitioner's] activities," although he would not have denied the visa on that basis alone (*ibid.*). That inquiry may have led to the discovery of evidence that petitioner's job was in fact more important than he represented at trial and was instead more consistent with what he told the Germans. Because of petitioner's concealment, the government was denied the chance to conduct such an investigation.

A third avenue of inquiry would have been among refugees in the displaced persons camps in Europe (see J.A. 212). Even 40 years after the events, the government was able to locate witnesses to the killings in Kedainiai who had information implicating petitioner (see Pet. App. 4a-5a n.1). It is likely that in 1947 or even in 1954, other witnesses could have been located in Europe who could have provided information on that subject. Such information could well have revealed that petitioner was in fact a perpetrator, not a victim, of persecution.[42]

In sum, the court of appeals was correct in concluding that the investigation in 1947 probably would have resulted in the discovery of information revealing that petitioner was not a victim of Nazi persecution.

c. *The Investigation Probably Would Have Led to the Denial of the Petition for Naturalization on the Ground that Petitioner Was Not a Person of Good Moral Character*

As we discuss more fully on pages 45-48, *infra*, a fundamental requirement of naturalization is that a

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[42] Notwithstanding all of the evidence indicating that he was not a victim of persecution, petitioner suggests (Pet. 18-19; Pet. Br. 38-39) that an investigation by consular officials would have shown that he was in fact such a victim. He cites in particular his evidence that he was active in the Lithuanian resistance movement. But the district court (Pet. App. 115a) found that the evidence on the issue was "conflicting" and noted that it was "impossible to state with any degree of certainty whether [petitioner] did or did not participate in the resistance movement." Moreover, petitioner fails to explain why, if he was indeed a member of the anti-Nazi resistance movement, he moved to Germany when the German troops retreated from Lithuania. And even if petitioner did participate in the resistance movement, which we dispute, it is unclear how such participation makes him per se a victim of Nazi persecution. In any event, as one court noted in a similar context, whether petitioner would have successfully passed an investigation was "for government authorities to determine to their satisfaction based on complete and truthful information in [1947], not for [petitioner] to decide for himself then, or for [the court] to decide now." *Palciauskas*, 734 F.2d at 628.

person be "of good moral character" (8 U.S.C. 1427 (a)). Moreover, under 8 U.S.C. 1101(f)(6), a person is not of good moral character if he "has given false testimony for the purpose of obtaining any benefits under this chapter." Former Immigration Judge Goldberg specifically testified that if the evidence revealed that an applicant's testimony was false, a determination would have to be made "whether the false testimony was such that [he] was bound to find that [the applicant] was not of good moral character and recommend adversely on his petition for naturalization" (J.A. 170; see also J.A. 171). Petitioner repeatedly lied about his date and place of birth, his wartime occupation, and his residence during 1941. Based on petitioner's myriad false statements under oath and his submission of fraudulent documents, Goldberg in all probability would have concluded that petitioner lacked the requisite moral character.[43]

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[43] At a minimum, if Goldberg had discovered that the applicant had given false information about his date and place of birth to the vice consul, he would have denied the petition and referred the case to the INS for possible deportation proceedings (J.A. 170, 172-173).

Petitioner errs in suggesting (Pet. Br. 27-28) that a naturalization examiner in 1953 would necessarily have forgiven an applicant's willful misrepresentations as to date and place of birth. Goldberg's reference to Section 241(f) of the 1952 Act (8 U.S.C. 1251(f)) made clear that a naturalization examiner would have referred cases of misrepresentations in a visa application to immigration officials to consider the propriety of a deportation action; Section 241 of the Act applies only to deportation and not to naturalization or denaturalization. Goldberg's testimony was that, even if immigration officials determined that petitioner had misrepresented his date and place of birth on his visa application, Section 241(f) could operate to allow the alien to remain a resident of the United States. However, that proceeding would necessarily entail at least a temporary denial of the naturalization petition. Goldberg also made clear that another naturalization petition could be considered only if an alien obtained discretionary relief under Section 241(f) and otherwise met the requirements for citizenship, including the necessary period of residence and physical presence. J.A. 171-174.

d. *The Investigation Might Have Led to the Discovery of Facts Showing Petitioner's Role in the Atrocities at Kedainiai*

If a vice consul had discovered petitioner's concealment of his residence in Kedainiai between July and October 1941, that fact would undoubtedly have raised suspicion,[44] since place of residence during the war was of particular significance to consular officials in Stuttgart at the time petitioner applied for his visa (see J.A. 189). Investigators in 1947 certainly knew that Nazi Germany had invaded the Soviet Union on June 22, 1941, and that in the next several months tens of thousands of Jews were slaughtered in mass executions throughout the occupied territories. Lithuania had one on the greatest concentrations of Jews who were murdered in that fashion. It was also known that many of these executions were carried out with the assistance of indigenous collaborators.

Given this background, no diligent investigator could have overlooked a willful misrepresentation concerning the critical time period between July and October of 1941 in Lithuania. Suspicion would have been raised as to why such a misrepresentation was made in the visa application;[45] that suspicion would only have been heightened if perpetrated by a Lithuanian immigrant who had been a member of the Riflemen's Association, who lived without restrictions in Nazi Germany, and who had represented that he had held a managerial position during the Nazi occupation of Lithuania. Considering that the government was able to come forward over 40 years

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[44] Participation in the atrocities, of course, would have disqualified petitioner from obtaining a visa (see Pet. App. 122a-123a).

[45] Even today, while petitioner admits that he lied in representing to United States officials that he had not lived in Kedainiai at all between 1939 and 1941, he still maintains that he was not living there at the time of the atrocities. The fact that petitioner continues to insist that he left Kedainiai prior to the atrocities, in the face of overwhelming evidence to the contrary, suggests that he has something of grave importance to hide concerning his activities in Kedainiai during July and August 1941.

later with evidence that petitioner participated in the atrocities in Kedainiai in July and August of 1941—evidence that even the district court found was "strong support" for the government's charges (Pet. App. 75a)—it is likely that in 1947, when Europe's displaced persons camps were filled with thousands of survivors from Lithuania, credible evidence of petitioner's participation in those atrocities could have been gathered. Indeed, even in 1954, at the naturalization stage, it is quite possible that additional evidence implicating petitioner could have been uncovered. At a minimum, it is clear that an investigation *might* have shown that petitioner was involved in the atrocities at Kedainiai in July and August of 1941.

II. IN LIGHT OF HIS PATTERN OF REPEATED MISREPRESENTATIONS, PETITIONER'S CITIZENSHIP WAS ILLEGALLY PROCURED, SINCE HE WAS NOT A PERSON OF GOOD MORAL CHARACTER

Under 8 U.S.C. 1451(a), a person whose naturalization was illegally procured is subject to denaturalization. A necessary prerequisite for naturalization is that a person be of "good moral character" (8 U.S.C. 1427(a)). See also 8 U.S.C. 1427(e) (in assessing good moral character, a court is not limited to an applicant's conduct during the preceding five years but "may take into consideration * * * [his] conduct and acts at any time prior to that period"). And 8 U.S.C. 1101(f)(6) provides that no person shall be deemed a person of good moral character if he "has given false testimony for the purpose of obtaining any benefits under this chapter." Read literally, these provisions suggest that even a single piece of false testimony can disqualify a person from citizenship because of a lack of good moral character. But this Court need not reach the issue of whether one isolated false statement is sufficient to show lack of good moral character, since it is clear that petitioner's *pattern* of lies over several years—lies that could have subjected

him to *criminal* prosecution under 18 U.S.C. 1001, 1015 (a), and 1621—demonstrates his lack of good moral character. See generally *In re Yao Quinn Lee*, 480 F.2d 673 (2d Cir. 1973) (upholding denial of naturalization on ground that false statement by applicant that he was living with his wife demonstrated lack of good moral character); *Tieri* v. *INS*, 457 F.2d 391 (2d Cir. 1972) (upholding denial of naturalization based on pattern of false testimony); *Ralich* v. *United States*, 185 F.2d 784 (8th Cir. 1950) (holding that commission of perjury demonstrates lack of good moral character justifying denial of petition for naturalization); *United States* v. *Forrest*, 69 F. Supp. 389 (D.R.I. 1946) (ordering denaturalization based on false statements made by naturalized citizen); *Petition of Ledo*, 67 F. Supp. 917 (D.R.I. 1946) (petition for naturalization denied because applicant's false statements revealed his lack of good moral character). As one court noted in a similar context, petitioner's false statements "revealed his character as that of one willing to defraud others, even including the parens patriae, for his own ends." *United States* v. *Accardo*, 113 F. Supp. 783, 786 (D.N.J.), aff'd on opinion below, 208 F.2d 632 (3d Cir. 1953), cert. denied, 347 U.S. 952 (1954).[46]

Petitioner lied repeatedly about the very facts that Congress specified must be disclosed (1924 Act, Section 7), including his date and place of birth. And those lies were clearly for the purpose of obtaining benefits under the immigration laws. To this day, petitioner has been unable to provide a cogent explanation of why he lied to the American officials.[47] The only conceivable explana-

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[46] The *Accardo* court also posed the following question (113 F. Supp. at 786): "How can a person claim to be of 'good moral character' * * * at the very time he is seeking to defraud the United States, in a matter of moment both to him and to the country?"

[47] At various times, petitioner has given two different reasons for his misstatements. First, in his March 1981 sworn interview,

tion for his lies about his wartime residence, date of birth, place of birth, and wartime occupations, was that he was trying to conceal something about his past that he thought would jeopardize his visa application or his citizenship petition.

In requiring good moral character as a prerequisite to citizenship, Congress surely could not have intended to include, as an eligible candidate, someone who engaged in this type of extensive and deliberate pattern of falsehood and deception.[48] Petitioner repeatedly gave false in-

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he indicated that he had false documents because he was a member of the Lithuanian underground and was trying to evade the Germans in April 1944 after the arrest of Lithuanian underground members (J.A. 131-136). But petitioner's false identification is dated April *26*, 1944 (J.A. 28), and the government offered evidence at trial that the arrests of the underground members occurred on April *29*, 1944 (GX T4; C.A. App. 1120-1121; C.A. Exh. 1250). Moreover, the government offered evidence that the identification card was actually forged by petitioner in *Germany* (see Pet. App. 113a). Second, during discovery petitioner claimed that he had false documents because he was trying to avoid German conscription. But petitioner's own witness, Yuozas Koncius, testified that in early spring of 1944, German conscription efforts were directed toward men born in or before 1924 (C.A. App. 1409). Obviously, petitioner would not have been protected against conscription by changing his date of birth from 1915 to 1913. In any event, these explanations do not explain why, years later, petitioner lied to the American officials even though he had given truthful information to the Germans. Nor does it explain his repeated lies that he did not live in Kedainiai during July and August 1941.

[48] Petitioner argues (Pet. Br. 24-25) that because "illegal procurement" was not a ground for denaturalization at the time he obtained his citizenship, it would be unfair to apply that provision to him. Although "illegal procurement" existed as ground for denaturalization prior to 1952, and was restored in 1961, it was omitted when the 1952 Act was passed. See Pub. L. No. 87-301, § 18, 75 Stat. 656 (amending 8 U.S.C. 1451(a)); *United States* v. *Kairys*, 782 F.2d 1374, 1382 n.12 (7th Cir. 1986), cert. denied, No. 85-1752 (May 27, 1986). But retroactive application of that statute is perfectly proper. First, as the court held in *Kairys*,

formation to United States government officials and did so "for the purpose of obtaining * * * benefits" under the immigration laws (8 U.S.C. 1101(f)(6)). His denaturalization is therefore required because he lacked the requisite good moral character at the time he obtained his citizenship.

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782 F.2d at 1380-1382, Congress intended that the 1961 statute be applied retroactively. As the court noted (*id.* at 1382), the 1961 amendment was added to a section that already contained a retroactivity provision (8 U.S.C. 1451(i)). In addition, other provisions of the 1961 amendment were explicitly made prospective only (§§ 17, 19, 75 Stat. 656). We know of no court that has held the 1961 illegal procurement provision to be prospective only. Moreover, such retroactive application does not offend the Ex Post Facto Clause. As this Court recognized in *Johannessen* v. *United States*, 225 U.S. 227, 242-243 (1912), in a very similar context, a denaturalization proceeding does not impose new penalties or make illegal or fraudulent that which was previously honest or lawful. See *Kairys*, 782 F.2d at 1382-1383 (retroactive application of 1961 legislation not a violation of Ex Post Facto law); *United States* v. *Koziy*, 728 F.2d 1314, 1320 (11th Cir.), cert. denied, 469 U.S. 835 (1984) (same). The one case cited by petitioner, *United States* v. *Riela*, 337 F.2d 986, 989 (3d Cir. 1964), is not to the contrary. *Riela* involved no issue of retroactive application of denaturalization legislation. The court in that case simply stated that the legality of naturalization must be determined under the statute in effect at the time of admission to citizenship (*ibid.*). *Riela* does not help petitioner, since good moral character was a statutory prerequisite to naturalization in 1954 (8 U.S.C. 1427(a)), when petitioner received his citizenship. In any event, petitioner was plainly on notice that misrepresentations to immigration authorities could result in his loss of citizenship. Indeed, in 1948, when petitioner declared his intention to become a United States citizen (J.A. 38-41), illegal procurement was still a basis for denaturalization. Nationality Act of 1940, ch. 876, § 340, 54 Stat. 1160. Furthermore, petitioner's application for citizenship warned him about the importance of telling the truth (J.A. 42). Petitioner could not possibly have believed when he obtained his citizenship that concealing facts and lying under oath about such basic data as his date of birth, place of birth, wartime residence and wartime occupation had somehow been sanctioned by Congress when in 1952 it deleted illegal procurement as a basis for denaturalization.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT H. KLONOFF
Assistant to the Solicitor General

SAMUEL ROSENTHAL
MICHAEL WOLF
JOSEPH F. LYNCH
Attorneys

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APPENDIX

1. Section 2 of the Immigration and Nationality Act of 1924, ch. 190, 43 Stat. 154 (repealed in 1952), provides in pertinent part:

> (f) No immigration visa shall be issued to an immigrant if it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that the immigrant is inadmissible to the United States under the immigration laws, nor shall such immigration visa be issued if the application fails to comply with the provisions of this Act, nor shall such immigration visa be issued if the consular officer knows or has reason to believe that the immigrant is inadmissible to the United States under the immigration laws.

2. Section 7 of the Immigration and Nationality Act of 1924, ch. 190, 43 Stat. 156-157 (repealed in 1952), provides in pertinent part:

> (a) Every immigrant applying for an immigration visa shall make application therefore in duplicate in such form as shall be by regulations prescribed.
>
> (b) In the application the immigrant shall state (1) the immigrant's full and true name; age, sex, and race; the date and place of birth; places of residence for the five years immediately preceding his application; whether married or single, and the names and places of residence of wife or husband and minor children, if any; calling or occupation; personal description (including height, complexion, color of hair and eyes, and marks of identification); ability to speak, read, and write; names and addresses of parents, and if neither parent living, then the name and address of his nearest relative in the country from which he comes; port of entry into the United States; final destination, if any, beyond the port of entry; whether he has a ticket through to such final

destination; whether going to join a relative or friend and, if so, what relative or friend and his name and complete address; the purpose for which he is going to the United States; the length of time he intends to remain in the United States; whether or not he intends to abide in the United States permanently; whether ever in prison or almshouse; whether he or either of his parents has ever been in an institution or hospital for the care and treatment of the insane; (2) if he claims to be a nonquota immigrant, the facts on which he bases such claim; and (3) such additional information necessary to the proper enforcement of the immigration laws and the naturalization laws, as may be by regulations prescribed.

(c) The immigrant shall furnish, if available, to the consular officer, with his application, two copies of his "dossier" and prison record and military record, two certified copies of his birth certificate, and two copies of all other available public records concerning him kept by the Government to which he owes allegiance. One copy of the documents so furnished shall be permanently attached to each copy of the application and become a part thereof. * * *

* * * * *

(f) Each copy of the application shall be signed by the immigrant in the presence of the consular officer and verified by the oath of the immigrant administered by the consular officer. * * *

3. 8 U.S.C. 1101 provides in pertinent part:

(f) For the purposes of this chapter—

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

* * * * *

(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;

* * * * *

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

4. 8 U.S.C. 1427 provides in pertinent part:

(a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner * * * (3) during all the period referred to in this subsection has been and still is a person of good moral character * * *.

* * * * *

(e) In determining whether the petitioner has sustained the burden of establishing good moral character and the other qualifications for citizenship specified in subsection (a) of this section, the court shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition, but may take into consideration as a basis for such determination the petitioner's conduct and acts at any time prior to that period.

5. 8 U.S.C. 1451 provides in pertinent part:

(a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by con-

cealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively * * *.

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